No. 4053

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JANG DAO THEUNG,

Appellant,

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco,

Appellee.

APPELLANT'S OPENING BRIEF.

GEO. A. McGOWAN,
550 Montgomery Street, San Francisco,
Attorney for Appellant.

JOHN L. McNAB,
Nevada Bank Building, San Francisco,
Attorney for Chinese Six Companies,
Of Counsel.

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Statement of the Case.

The record presents an appeal from an order and judgment denying the petition for a writ of habeas corpus by which latter proceeding it was sought to relieve the appellant, Jang Dao Theung, of the restraint, detention and imprisonment imposed by the Commissioner of Immigration for the Port of San Francisco, who is the respondent in said action. Jang Sing, otherwise known as Jang Wey Ming, a resident Chinese merchant lawfully domiciled within the United States sought to have admitted into the United States a minor son, Jang Dao Theung, the appellant herein. The case was first heard before the immigration authorities at the

Port of San Francisco, and thereafter by the immigration inspector at Fresno and at Fowler, at which latter mentioned place the father is engaged in business as a merchant. At the conclusion of these examinations the attorney for the Chinese was advised that the Commissioner of Immigration was not satisfied from the evidence presented of the existence of the relationship of father and son. This notice contained the following clause (Exhibit A, p. 38):

> "A period of ten days will be allowed for the introduction of additional evidence, provided notice thereof is filed with this office within five days. Review of the record will not be permitted during the time allowed for the submission of further evidence."

The attorney for the Chinese being unable to inspect the record was unable to ascertain in what particular, or particulars, the evidence already presented was deemed and held to be insufficient. It was apparent from the terms of the notice that the mercantile status of the father, and also the minority of the applicant, were conceded, and that the sole and remaining point at issue was the existence of the relationship. A careful checking of the details with the interested parties brought to light no discrepancy or inconsistency and hence the then attorney stated that he knew of no additional evidence which he had to present, and a final denial was accordingly entered (Exhibit A, p. 41). An appeal was taken from this excluding decision to the Secretary of Labor and in response to the at-

torney's request (Exhibit A, p. 44), he was, for the first time, accorded an inspection of the record, which disclosed that the adverse finding of the Commissioner was based upon two grounds: *first,* that the immigration authorities had failed to verify from their records the trip which the father claimed to have made to China, and upon which he claimed this applicant had been begotten. This trip is usually referred to as the trip essential to establish paternity. The *second* and final ground urged for the denial was what was claimed to be a prior declaration or statement of the father that he had never been married, it being claimed that the declaration in question was made at a time after the period claimed for the birth of this appellant, which prior declaration, if true, would preclude the existence of the relationship of father and son.

The attorney representing the Chinese under date of October 20, 1922 (Exhibit A, p. 46), advised the Commissioner that the father had inadvertently given the wrong date for his departure for China, and also the wrong name under which the trip had been made, the trip to China having actually taken place in 1907 and his return occurring in 1908, the name under which the trip was made being Chin Ah Fook (Jeng Ah Fook). A subsequent search of the immigration records verified the correctness of the additional information supplied, and the existence of the trip essential to paternity was hence established, and even though it had been made under a different name, the father's identity was

established and conceded. Thereupon, upon their own motion, the immigration authorities reopened the case and eliminated their first ground of objection, and again redenied the case, but at this time solely because of the prior adverse declaration as to the father's marital status (Exhibit A, pp. 52 and 55). At this time the present attorney of record herein was associated in this case before the immigration service (Exhibit A. p. 78), and asked that the record in the case be sent to the San Francisco Immigration Office for his inspection, as is customary in such cases. The record, however, had been, upon that day, transmitted to the Secretary of Labor upon appeal so this request could not be complied with.

Contemporaneously with the entire history of this case before the immigration service there were posted upon the bulletin board at Angel Island for the information of attorneys handling immigration cases, and immigration inspectors, certain instructions contained in letters from the department dated September 20, 1919, and October 14, 1919, referring to Department of Labor letters 54697/23, which directed that in all cases wherein it was shown that the father had previously made any declaration or statement as to his marital or family conditions adverse to those claimed under examination, that the father should be confronted with the earlier adverse declaration affecting paternity or relationship and asked whether he had made the same and that he should be given opportunity to, and should

be called upon to make his explanation with respect thereto (for corroboration see letter of court officer P. A. Robbins, Exhibit A, pp. 92-93, and letter of appellant's attorney, Exhibit A, pp. 85 to 91). The existence of this requirement was well-known to the attorneys handling this case, and the fact that the father had not been so confronted with the prior declaration or statement adverse to paternity, and had not been asked for any explanation with respect thereto misled the appellant's attorneys in that regard and convinced them that no such point existed in this case, as they had a right to assume that the department's instructions in that regard should have been, and were, complied with. The importance of this point cannot be over-estimated, because had the instructions been complied with the attorneys would have known of the existence of this prior statement, and would have had ample opportunity to present their evidence before the local immigration service had entered its final denial, thus closing the case for the reception of additional evidence. When the additional evidence was gathered and presented one of the reasons assigned for its rejection and denying the contents of the affidavits the full force and effect to which they were entitled, was the fact that the additional evidence in question should have been presented between the preliminary denial (Exhibit A, p. 38), and the entry of the final denial (Exhibit A, p. 41) after which, of course, the case was closed for the reception of additional evidence. It is because the instructions of the depart-

ment, which were posted in a public manner for the instruction, enlightenment and guidance of attorneys practicing before the Angel Island immigration office as well as for the instruction of the immigration officers themselves, were not followed by the latter, which includes not only examining inspector Moore at Fowler and Fresno, but inspector Mayerson and the Commissioner and Assistant Commissioner of Immigration at San Francisco, whose duty and obligation it was to see that these public instructions were followed and complied with, before the case had been finally disposed of, that vital and irreparable injury was done this appellant. The only time and opportunity he had to overcome this act of negligence upon the part of these various officers was after final entry of denial which, of course, was after the case had been closed for the reception of additional evidence. One of the reasons for the rejection of this testimony by the Secretary of Labor upon his consideration of it was the fact that it had not been presented before the local immigration service prior to the entry of this final denial (Exhibit A, pp. 72 and 80). This presents a situation of the governmental officers charged with the enforcement of the Chinese Exclusion Laws taking advantage of the injury which they themselves had done to this appellant in not complying with their own public regulations and instructions.

The appellant's father, Jang Sing, otherwise known as Jang Wey Ming, went to China as a de-

parting Chinese merchant under the name of (Jung) Ah Fook; he departed in 1907 and returned September 27th, 1908, he, at that time, claiming to be a member of Hong Sing Kee Co., a firm engaged in business on G Street, Fresno (Exhibit B). It is upon this trip to China that he became married, and as a result of this union and upon this trip to China, this appellant was born. The Government omitted taking any statement from the father upon his return from this particular trip to China; they had the opportunity but did not avail themselves of it. The father next went to China upon a laborer's return certificate under the name of Gang or Jang Sing, and prior to his departure the merits of his case were examined into at Fresno, and in the course of his examination, which was quite protracted, he was asked the following questions (Exhibit D, pp. 1 and 2):

"Q. What are your names?
A. Gang Sing; no other name.
Q. Were you ever known by any other name?
A. No.
Q. Have you been to China?
A. No.
* * * * * * *
Q. Have you a family in this country?
A. No.
Q. Have you any property in this country?
A. No.
Q. Does anyone owe you any money?
A. Jung Hing Ying, farmer, Reedley, California.
* * * * * * *
Q. Are you married?

A. No.
Q. Were you ever married?
A. No."

* * * * * * *

The father returned from China on this visit as incoming passenger No. 182 on the S. S. Manchuria, October 29, 1912, and was examined upon the steamer prior to being readmitted, and he then stated that he had been married once, that his wife was Sim Shee to whom he had been married K. S. 33-12-21 (January 23, 1908), that she had natural feet and was living in China, that they had one boy and no girls, the boy's name being Jang Jow Sheung, five years old, who was born K. S. 34-12-22 (January 12, 1909), and was then in China (Exhibit D, p. 8). It will be observed that this prior adverse declaration upon which the Government relied to deny this case was made in 1911, and within a year, and in fact upon the return of this identical trip to China, the father is of record with testimony in exact conformity with that contained in the present case, making, of course, due allowance for phonetical differences in spelling.

Reading the prior adverse declaration which, if true, precludes the paternity claimed in this case, must convince one that the father should have been confronted with these prior adverse statements and his explanation asked with respect to the same before a final adverse decision was rendered in this case, so that suitable opportunity would have been given to present any additional, or other, evidence at the

father's disposal, or which he could obtain, which would explain the statements and further corroborate the testimony as to the relationship. The testimony already of record concededly was ample to establish the existence of the relationship except as it was detracted from, or, let us say, impeached, by the existence of this prior adverse declaration, the existence of which was withheld from the appellant, his father and his attorney.

Thereafter appellant's attorney secured affidavits from a number of additional witnesses who had personal knowledge of the prior marriage of the father of the appellant, and also of the birth of the appellant, all as testified to by the father and the appellant (Exhibit A, pp. 95-99). These affidavits were prepared as a foundation for the subsequent examination of these particular affiants as prospective witnesses in this case. This additional testimony consisted of the affidavit of Jang Lou Wong, otherwise known as Sam Yick, and Lee Jen, his wife (Exhibit A, pp. 98 and 99), who were residents of Bakersfield, and had long been acquainted with the father of this appellant Jang Sing, and they went to China together as a party on the S. S. Mongolia November 16, 1907. Their homes in China were in close proximity and they knew that Jang Sing was going to China upon that visit particularly for the purpose of being married. They were in China at the time and were present at Jang Sing's marriage, and they remained in China for a period of about two years after the father, Jang

Sing, had returned to this country. They knew his wife in China, they saw his son, this appellant, shortly after his birth, and upon a number of occasions prior to their return. Their affidavit gives all the facts with respect to their departure and their residence in China, and their departure and return records were in the custody of the respondent showing that they had made the trip in question, and their testimony was of record as to their place of residence and showing that it was in close proximity to the home of Jang Sing, as claimed by them. The affidavit recited that those facts were within their own personal knowledge and they expressed their entire willingness and desire to appear and testify in support of the facts recited therein. There was presented an affidavit of Wong Wing Sing (Exhibit A, pp. 97 and 96) who had been for many years a resident of California, stating that he was for many years acquainted with Jang Sing, this appellant's father, and that he had during all the years handled and supervised the financial affairs of Jang Sing; that he knew of Jang Sing's going to China in 1907, and knew that the object of that trip was to be married. Upon his return from China in 1908 Jang Sing informed this affiant of his having been married, and for many years thereafter there was transmitted through this affiant's store sent by Jang Sing to China for the support of his family which consisted of his wife and child. There was also presented the affidavit of Hong Gong Chong (Exhibit A, p. 95), who had recently

been in China, and who was personally acquainted with Jang Sing, and had been for many years last past; that his home in China was in extremely close proximity to that of Jang Sing, and that while there he knew of Jang Sing and his wife and family in China. These affidavits were sent on to the Department at Washington for consideration with the appeal. Instead of returning the record to the San Francisco office for the examination of these additional witnesses the Secretary of Labor proceeded to and did finally dismiss the appeal without affording the appellant any opportunity to have the testimony of the witnesses in question taken (Exhibit A, pp. 58 to 72). Thereafter appellant strenuously objected to the order of deportation without being afforded the chance to have the testimony of his additional witnesses taken, and the Secretary of Labor referred the matter to the Commissioner of Immigration at San Francisco for his report in the premises (Exhibit A, p. 72). Thereupon, and on January 4, 1923, attorney for the petitioner presented a full statement and a request for a rehearing, setting forth the grounds upon which the same was based (Exhibit A, pp. 85 to 91). The request was referred by the Commissioner to the court officer of his service, Mr. P. A. Robbins, who thereafter made a report recommending that the case be reopened and reheard. This recommendation was conveyed to the Secretary of Labor who directed the reopening and rehearing of the case. The report of court officer Robbins and the

order of the Secretary granting the rehearing were, of course, not open to the inspection of the attorney for the appellant. Thereafter the case was sent to Fresno, where all the additional witnesses were fully heard and examined (Exhibit A, pp. 104 to 123). The case was redenied and reappealed, and the record of the additional hearings and the report of court officer Robbins, and the decision of the secretary reopening the case, were then for the first time open to the inspection of the attorney for the appellant. The report of court officer Robbins (Exhibit A, pp. 92-93) recommended a reopening of the case because he was of the opinion that if the immigration service did not reopen it that the court would on habeas corpus grant the writ and try the case de novo, and the Secretary of Labor in his order (Exhibit A, p. 74), directed the reopening of the case for the purpose of preventing a court action in which it was feared the court would adjudge the prior immigration unfair and try the case upon its merits de novo before the court, and to prevent this contingency the case was reopened. The reopening does not seem to have sprung from any feeling upon the part of the immigration authorities that their prior hearing had been at all unfair or the rights of the appellant infringed upon; in fact, the tenor and words of the Secretary in his order reopening the case is a substantial defense of his position of having accorded the appellant every right and consideration and that he was entitled to no more, but that through

fear that the court might hold otherwise and assume jurisdiction and retry the case on its merits in a court of justice the Secretary would reopen the case and rehear it to prevent that contingency.

The appellant accepted the rehearing in good faith in the belief that the reopening was prompted by consciousness on the part of the officers who directed it that the earlier hearing had been unfair, and that through inadvertence, or otherwise, the governmental officers had abused the discretion vested in them, and prompted by such consciousness on their part they would reopen and reexamine the case and fully and fairly reconsider it with minds open to be properly influenced by the evidence which the secretary had refused to direct to be taken in the original appeal. Fair play to the appellant would have dictated that the case should be reopened by the secretary for such purpose. Had the appellant known that the reopening was granted solely to prevent the court adjudicating the original hearing unfair and trying the case upon its merits, and that the secretary still maintained the propriety and legality of his earlier action in the case, this appellant would have immediately taken his case into court.

The report of court officer Robbins, hereinbefore referred to (Exhibit A, pp. 92-93) concludes as follows:

> "There is another question involved in the present case, which, to my mind, if the matter was taken into court, a writ of habeas corpus

would result in the court holding the hearing unfair, and might possibly result in a hearing de novo before the court, and that is that at the time the father was examined in Fresno he was not confronted by his declaration made in 1911 that he was not married.

"Under dates of Sept. 20, 1919, and Oct. 14, 1919, the Department in its letters 54697/23, directed that in all future cases all witnesses be so confronted with these prior declarations. It is possible, however, that Inspector Moore of Fresno, who at that time was under the jurisdiction of the Los Angeles Office, was not informed of this procedure, which may account for his failure to bring this matter to the attention of the alleged father.

"In view of the fact that the father was not confronted with his prior declaration and the probability of habeas corpus proceedings being instituted, I would recommend that the case be reopened for the taking of the evidence of such additional witnesses as the interested parties may desire to submit and that the father be confronted with his prior declaration."

While the decision of the secretary granting the reopening (Exhibit A, p. 74), has the following to say with respect to the earlier hearing:

"The record contains the affidavit of two persons who claim to have a knowledge on the essential facts. These affidavits were considered when the case was previously before the Board of Review, and the conclusion was reached that it would be unnecessary to delay disposing of the case until the testimony of the affiants could be taken, provided the affidavits were considered as embodying substantially what the affiants would testify to. Counsel also pointed out in his brief that the immigration officials, in examining the alleged father had failed to

> question him regarding his testimony of 1911, during the course of which he made statements inconsistent with the claims of paternity now advanced. This point likewise was not regarded as of sufficient importance to call for the return of the record to San Francisco."

And referring to the case of Low Joe, now reported (Exhibit A, pp. 82-84) (287 Fed. 545), the secretary goes on to show why he grants a rehearing:

> "* * * This impresses the Board of Review as somewhat remarkable, but the United States Attorney at San Francisco does not believe an appeal to be advisable, and it is therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also to be unfair, because the alleged father was not questioned regarding his 1911 testimony. For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable there is no real reason for not also taking the testimony of the additional witness. The Board of Review recommends that the case be reopened in order that the testimony of the additional witnesses may be taken, and also, in order that the father may have an opportunity to submit such explanation as he may be advised of his 1911 statements."

It is noteworthy to observe that in this order of the secretary reopening the case there is expressed no consciousness of any wrong done the appellant, and no hope or assurance held out that the evidence which he desired to have taken would be carefully weighed and considered and the case redecided in

the light of what might be developed in such additional and further examination and development of the facts; quite the contrary, however, was the affirmative statement disregarding the statements of the unexamined witnesses as embodying in their affidavits that they had reached the conclusion that it would be unnecessary to delay disposing of the case until their testimony could be taken provided their affidavits were considered as embodying substantially what their testimony would be, and also that the failure to confront the father with the prior adverse declaration likewise was not regarded of sufficient importance to call for the return of the record to San Francisco. The real reason for granting the rehearing was apparently not to afford the appellant any additional right to be fully and fairly heard, but, as stated by the secretary,

> "* * * and it is, therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also to be unfair, because the alleged father was not questioned regarding his 1911 testimony. *For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable there is no real reason for not also taking the testimony of the additional witness.*"

Appellant had a right to presume that the rehearing accorded him was prompted by a consciousness upon the part of the secretary that his prior order was arbitrary and that the appellant had been denied the full and fair hearing to which he

was entitled under the law, and not, as seems to be indicated, a rehearing at which the empty forms should be observed which would deprive the appellant of the right to a judicial hearing which, at that juncture of the case, seemed to be conceded to him. The actuating reason in the mind of the secretary for according the rehearing was to prevent the court from assuming jurisdiction and trying the case de novo upon its merits, and the substantial benefit which the appellant expected from the rehearing finds no place in the order granting the rehearing, the contents of which were withheld from the appellant until after the entry of the second and final denial (see petition, sub-division 4, T. R. 10-14). The father's testimony upon reexamination wherein he was confronted with and called upon to explain the prior adverse declaration is as follows (Exhibit A, pp. 118 to 119):

"Q. On which trip were you married?
A. Married on my first trip.
Q. What was the date of your marriage?
A. K. S. 33-12-21 (January 23, 1908).
Q. If you were married in January, 1908, what was the purpose of testifying in San Francisco in November 1911, that you were not married?
A. I didn't testify to that.
Q. You are advised that your record covering your departure from San Francisco as a laborer in 1911 indicates that on Nov. 18, 1911, you were questioned as follows: 'Q. Are you married?' A. 'No.' 'Q. Were you ever married?' A. 'No.' In view of this testimony, what explanation have you to offer?
A. I was advised by the Chinese interpreters that to go home to China as a laborer, you

either had to have a wife and family in the United States or have $1,000 worth of property or debts. As I didn't have a wife or family in the United States I said 'No'. When they asked whether I was married or ever had been married I understood them to mean if I was ever married or had a family in the United States. I had a wife and family in China at that time and had one son who was born after my return to the United States in K. S. 34 (1908).

Q. Your record further indicates that you were asked the direct question: 'Have you a family in this country?' and you replied: 'No', The questions just quoted to you are distinct and separate. Please explain how you misunderstood the question: 'Are you married?' to refer to whether you were married only in the United States?

A. They were talking about having a family in the United States and I supposed that all the questions referred to whether I had a family in the United States. It was a misunderstanding on my part.

Q. Did the interpreter speak the same dialect that you spoke in your hearing in 1911?

A. Yes, we both spoke the See Yip dialect, but the interpreter seemed to take a dislike to me and spoke very gruffly to me, didn't give me an opportunity to answer questions fully and didn't always make himself plain. It may be that he misunderstood me, but I know that he gave me the wrong impression and led me to believe that he only referred to whether I had a family in the United States."

The finding of the secretary upon this feature of the case is as follows (Exhibit A, pp. 141 and 142):

"The prior testimony of the alleged father which, if true, precluded his being the father of the applicant, will be found discussed in the

> memorandum of Dec. 21, 1922. It seems that the alleged father when testifying in his own behalf as an applicant for laborer's return papers, stated that his name was Jang Sing; that he had no other name, that he had never been known by any other name; and that he was not married. The year of the applicant's birth is given as 1909. It is now claimed by way of explanation that the alleged father when he testified in 1911 was referring to a wife in this country, he having been told previously that in order to qualify for a laborer's return paper he must have a wife or family, or debts in the amount of $1,000 due him here. This explanation in view of the unequivocal testimony of the alleged father at that time that he had no other name and had never been known by any other name, is not believed to be satisfactory, in view of the well known and almost universal custom of the Chinese of taking an additional name, known as the 'marriage' name when they marry."

We claim that the above finding of the secretary is impeached by the records of this case and by the law regulating the departure of Chinese laborers from the United States. The secretary lays stress upon the fact that the father testified that his name was Jang Sing, and that he had no other name and that he had never been known by any other name, and yet this did not make it so, because the secretary then and there had before him the official records of his office, which disclosed that three years previously this same party was known by, and had gone under the name of Jang Ah Fook. The father further testified at that time that he had never made any previous trips to China, and yet this did

not make it so, because the secretary had before him his official record (Exhibit B), showing that the father had made an earlier trip to China notwithstanding his statement to the contrary. In this same disputed statement of 1911 the father was asked if he had any property in this country and he said "No", and as showing the ease with which misunderstandings may exist when such examinations are conducted through the medium of an interpreter he goes on to testify that he did have property here consisting of debts due him of at least $1000, which were approved by the immigration authorities as existing and used as a basis and foundation for the issuance of the laborer's return certificate upon which the father made his trip to China as a laborer in 1911. Here are three separate and distinct misstatements of the father which are shown by the records before the Commissioner,—and the verity of which records are not questioned—which show facts contrary to those given by the father in 1911. The secretary states that the father's explanation as to stating that he was not married, namely, that he thought the questions referred to his condition in this country, was not convincing, and yet the applicant was being examined for a laborer's return certificate and Section 6 of the Act of Congress of September 13, 1888 (25 Stat., pp. 476-477), states as follows:

> "Sec. 6. That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United

States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement."

When we observe the statutory foundation for the examination of a laborer's return certificate we see that the explanation made by the appellant's father is exactly in conformity with the law, and not only that, when we take up this old examination of 1911 we find that the questions first asked of the father as to his marital status were limited and restricted to this requirement of the statute:

"Q. Have you a family in this country?
A. No."

And it is to be observed that the limitation spoken of by the father is contained in the question as asked of him, and when we consider that the father is rather a simple, primitive and uneducated man who is testifying through the medium of a Chinese interpreter it is not to be wondered at that in the latter part of his examination when he was asked the question, "Are you married?" and "Were you ever married?", that he should have understood these two questions to be subject to the same limitation as to his status in this country, because that was the requirement of the law, and the exact form in which the first question upon that point was asked of him through the medium of the Chinese interpreter. Certainly such a reasonable explanation so amply verified should not be lightly thrust aside and disregarded.

The decision of the secretary upon the testimony of the additional witnesses is as follows (Exhibit A, pp. 141 and 142):

> "Four witnesses have testified in the reopening hearing at San Francisco. Wong Bing Sing claims to have known the alleged father for many years and to have attended to details for him when he (alleged father) was sending money to his family in China. This witness does not know the wife of the alleged father nor has he ever seen the applicant, according to his testimony. Jang Low Wong and his wife, Lee Jen, state that when they went back to China in 1907 the alleged father was a passenger on the same boat, in fact it appears from their testimony that they were returning to China as a party. They state that the alleged father told them he was returning to China to marry and they further testified that they attended his wedding in the home village. Lee Jen also states that she saw the applicant when he was a few weeks old. Hong Gong Chong testifies that he has known the alleged father for fifteen or twenty years and when he (witness) was in China in 1921-22 he met the applicant's mother on the streets of her village. She told the witness that her son Jang Dao Theung had gone to the United States, but that she did not know as to whether or not he had as yet joined his father here. She asked the witness to find out about it and he communicated with the alleged father on the subject when he arrived back at San Francisco. The testimony of all of the witnesses is in good agreement, and would certainly be sufficient to establish the right of the applicant to enter the United States, were it not for the prior adverse testimony of the alleged father."

As a legal proposition we submit that what the secretary seems pleased to consider as a conflict in the testimony given at different times by the father could only have the legal effect of impairing the father's credibility and pointing out that his testimony should be scanned with care, or requiring that it should be corroborated. In no sense can it, in fact or in law, impeach the credibility of these witnesses, or warrant the disregarding of their testimony, as their credibility is unassailed and they have personal and exact knowledge of the precise fact in issue, namely the existence of the relationship of father and son between this appellant and his father. These elements are covered in the petition for the writ (Par. 5 T. R. 14-15). The conclusiveness of the evidence is covered in paragraph 1 of the petition (T. R. 6-7); the failure and refusal of the secretary to cause the father to be confronted and given a chance to explain his earlier and adverse declaration, which occurred in and characterized the first hearing, is covered in paragraph 2 of the petition (T. R. 7-8); complaint against the action of the secretary in refusing to examine and take the testimony of the additional witnesses, which also characterized the first hearing, is contained in paragraph 3 of the petition (T. R. 8-9-10). The assignments of error are contained on pages 24 and 25 of the transcript and need not be restated in detail.

Argument.

Appellant contends that the hearing accorded in this matter by the immigration authorities was unfair as respects the procedure followed during the hearing and additionally that there was a manifest abuse of discretion in the consideration of the evidence presented, and finally that there was a fundamental misconception of the basic rules of evidence.

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1. THE QUESTION OF PROCEDURE.

Upon the question of procedure followed it is respectfully maintained that it was the duty of the Secretary of Labor upon the receipt of the appeal record from the San Francisco office and the receipt from the attorney in Washington of the affidavits of certain proposed additional witnesses to have returned the case to the San Francisco office with instructions to afford the appellant an opportunity to present the proposed additional witnesses for examination to the end that their testimony might be taken and that he might have the benefit of it upon appeal.

An inspection of the record disclosed that the sole reason urged for the denial of the case was the fact that it was claimed that the father had made a statement in 1911 that he was not, and never had been, married, whereas his testimony in the present case was to the effect that he had been married in

1908. The standing rules of the department, and the instructions of the department to the Commissioner of Immigration at San Francisco were in all such cases the father should be confronted with the prior declaration and be given an opportunity to admit, deny or explain the same. It is admitted that these instructions were posted in a public place at the Angel Island immigration station for the information of attorneys and inspectors. The record disclosed that this departmental regulation had not been complied with, and hence the case was closed for the reception of evidence without the father having been given an opportunity to be heard thereon. Instead of sending this case back to San Francisco for this purpose the Secretary of Labor proceeded to consider the substance of the affidavits and dismissed the appeal without taking the testimony of these proposed witnesses. We submit that this was fundamental error and rendered the hearing of the case absolutely unfair. We contend that the Secretary of Labor and his subordinate immigration officers were compelled by law to take the testimony of all material witnesses, and that they had no choice in the premises of electing to hear this witness or that witness, and any alleged hearing wherein they refused to take the testimony of material witnesses upon the crucial point in the case was manifestly unfair and would render their procedure nothing but the semblance of a hearing. Upon this point we cite the following authorities:

In the case of *U. S. v. Sing Tuck* (194 U. S. 161; 48 L. Ed. 917; 24 Supt. Ct. Rep. 621), wherein the court held:

> "* * * No right is given to the officer to exercise any control or choice as to the witnesses to be heard, and no such choice was attempted in fact. On the contrary, the parties were told that if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered; and various other attempts were made to induce the suggestion of any evidence or help to establish the parties' case but they stood mute. The separate examination is another reasonable precaution, and it is required to take place promptly, to avoid the hardship of a long detention. In case of appeal counsel are permitted to examine the evidence, Rule 7, and it is implied that new evidence, briefs, affidavits, and statements may be submitted, all of which can be forwarded with the appeal, Rule 9. The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit."

It will be noted that the rules with respect to the production of additional evidence after the denial of the case at the port of entry have been changed since the adjudication in the case just cited. The present rules provide that if after a consideration of the evidence presented the applicant is deemed inadmissible that the attorney or representative shall be notified of that fact, thus giving and affording an opportunity to present additional evidence before the final denial after the entry of which the case is no longer open for the reception of evidence.

Under Section 17 of the General Immigration Act of February 5, 1917, it is noted that the review on appeal is restricted to the evidence which was received and considered by the Board of Special Inquiry at the port of entry. The Chinese rules and regulations, Rule 3, subdivisions 2, 3 and 4, provide for board hearings in Chinese cases under the Chinese Exclusion Laws. These subdivisions are as follows:

> Subd. 2. Order of Examination Under Immigration and Exclusion Laws. — Chinese aliens shall be examined as to their right to admission under the provisions of the immigration law and rules as well as under the provisions of the Chinese exclusion treaty, laws, and rules. As the former law and rules relate to aliens generally, the status of Chinese applicants must be first determined thereunder; then if found admissible under the immigration law and rules, their status under the Chinese exclusion law and rules shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants through misunderstanding, and in the interest of good administration, examination under both sets of laws and rules shall be made in the order stated, only at the ports named and in the manner specified in Rule 1 hereof.
>
> Subd. 3. Hearings.—Boards of special inquiry shall determine all cases as promptly as in the estimation of the immigration officer in charge the circumstances permit, due regard being had to the necessity of giving the alien a fair hearing. Hearings before the boards "shall be separate and apart from the public"; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed: Provided, First, that

such friend or relative is not and will not be employed by him as counsel or attorney; second, that, if a witness, he has already completed the giving of his testimony; third, that he is not the agent or a representative at an immigration station or an immigration aid or other similar society or organization; and, fourth, that he is either actually related to or an acquaintance of the alien.

Subd. 4. INTRODUCTION OF ADDITIONAL EVIDENCE.—If upon examining the applicant and the witnesses appearing in his behalf the board of special inquiry does not conclude that the applicant is admissible, notice shall be served upon the applicant or his attorney to that effect, such notice to state the respect or respects in which the evidence is deemed by the board of special inquiry to be insufficient. If the applicant or his attorney within five days thereafter expresses a desire to introduce additional evidence, ten days from the date of the first mentioned notice shall be allowed for that purpose. If neither the applicant nor his attorney thus indicates a desire to introduce additional evidence, the case shall be closed.

While Section 17 of the General Immigration Act of February 5, 1917, providing for the boards of special inquiry in their hearings and final decisions, contains this clause:

"* * * But either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at

> the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. * * *"

It is, therefore, respectfully contended upon behalf of the appellant in this case that under subdivision 4 or Rule 3 of the Chinese Regulations it would have been the duty of the Commissioner to have advised the appellant's attorney, not only that they were not satisfied with the existence of the relationship (Exhibit A, p. 38), but such notice should also have stated "the respect or respects in which the evidence is deemed by the board of special inquiry to be insufficient"; in other words, under the regulation that should have advised us in the notice of the existence of the prior adverse statement of the father which they relied upon as the basis for their preliminary adverse holding. Thus we see not only did they violate the regulations of the Department which were posted upon the bulletin board at Angel Island with respect to confronting the father with the prior declaration, but they additionally violated subdivision 4, just quoted, in failing to give appellant's attorney the information about the crucial point involved in the case. We therefore contend that this point is controlled by the decision of the Supreme Court in the case of *Chin Yow v. U. S.* (208 U. S. 8; 52 L. Ed. 369; 28 Sup. Ct. Rep. 201), wherein the court held:

> "* * * The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the Commis-

sioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. * * *"

"* * * But the petition further alleges that the petitioner was prevented by the officials of the commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing, and such an opportunity to prove his right to enter the country, as the statute, meant that he should have. * * *"

"* * * We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in United States v. Sing Tuck, (194 U. S. 161, 169, 170; 48 L. Ed. 917, 921; 24 Sup. Ct. Rep. 621), as giving them some control or choice as to the witnesses to be heard."

In the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. Rep. 566), the court held as follows.

"The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the re-

straints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race."

Turning our attention now to the original decision of the Secretary of Labor (Exhibit A, p. 65) we find that official considering the affidavits of these proposed additional witnesses, we find him admitting that the affidavits do set forth very persuasive matter, and that the evidence therein contained would be amply sufficient to justify the landing of the appellant were it not for the existence of this prior declaration of the father in 1911 that he was not, and never had been, married, whereas according to the claims upon behalf of the present appellant the father was at that time married and father of this appellant. When we take into consideration that the Secretary of Labor was passing judgment upon an appeal record in which his own regulations had been twice violated, first, in the failure and neglect of the officers at the port of entry to confront the father with the prior adverse declaration and give him an opportunity to admit, deny or explain the same, which would have afforded him an opportunity before the final denial of the case to submit additional evidence with respect thereto (Exhibit A, pp. 92 and 93, and pp. 85 to 91), and second, we find them additionally violating subdivision 4 of Rule 3 of the Chinese regulations in failing in their notice of the preliminary denial to the appellant's attorney to specify the existence of this prior declaration as the controlling and crucial ob-

jection to the case (Exhibit A, p. 38), it certainly would have been but elemental justice for the Secretary of Labor to have either accepted these affidavits at their face value or, on the other hand, to have directed the reopening of the case for the purpose of permitting the appellant to have the testimony of these named and designated witnesses taken before the regular immigration officials, and certainly he was most unwarranted in assigning as one of the reasons for his refusal to do so the fact that the witnesses should have appeared and should have testified before the officials at the port of entry. This last mentioned reason is not disclosed in his original opinion but comes forth with startling frankness in his telegram to the Commissioner of Immigration at the Port of San Francisco (Exhibit A, pp. 72 and 78) these being respectively telegrams from the secretary to the commissioner at San Francisco and from commissioner at San Francisco to the Secretary of Labor at Washington. The reason why these witnesses were not originally presented was because the hearing accorded the appellant was manifestly unfair. Had the appellant been appropriately notified and advised of the existence of the point of this prior adverse declaration these additional witnesses would certainly then and there have been presented and their testimony taken and it would hence have been freed from the detracting objection which seems to have so potently influenced the Secretary of Labor against their examination before a decision of the case upon its merits.

I presume that the Government will maintain that these objections are all answered by the fact that the secretary thereafter reopened the case and directed that the father should be so confronted with his prior earlier adverse declaration as to his then marital condition, and also directed the taking of the testimony of these proposed additional witnesses. Our answer upon this point is the fact that we were only informed that the case had been reopened for the taking of this additional testimony, but were not informed of the reasons why the Secretary of Labor was actuated in granting this rehearing. Appellant supposed that this rehearing had been prompted by a consciousness upon the part of the Secretary of Labor that the earlier hearing had been unfair and that there had been an abuse of the official discretion committed to him in his earlier adverse finding, and that a rehearing and reconsideration of the case should be had in which there would be a full and fair reexamination and a new determination of the appeal in which a final judgment would be rendered upon and after a full and fair consideration of the evidence. We did not know, and did not discover, until after the final denial of the case that reason set forth for the reopening of the case was really to prevent a writ of habeas corpus being then and there applied for which would have resulted in a trial de novo before the court wherein the fact of appellant's admissibility would be judicially determined. This latter situation is fully presented and disclosed in the report of court officer Robbins (Exhibit A, pp. 92

and 93), and in the opinion of the Secretary of Labor in reopening the case (Exhibit A, p. 74). We did not know that in granting this rehearing that the Secretary of Labor had already prejudged and predetermined the evidence which we sought to introduce; we did not know that the secretary had already held in his order granting a rehearing with respect to the examination of the father confronting him with a theretofore undisclosed prior adverse declaration and taking the testimony of the proposed additional witnesses, that with respect to these matters the secretary in his very order granting the rehearing held:

> "* * * This point likewise was not regarded as of sufficient importance to call for the return of the record to San Francisco."

It is apparent from these rulings and holdings of the Secretary of Labor that the rehearing accorded in this matter was already prejudged and predetermined adversely to the appellant even before the rehearing had taken place, and that the sole reason urged for the granting of the rehearing and the sole reason put forth in the order granting the same was to prevent the writ of habeas corpus being then and there applied for. The attitude of the department with respect to this matter savors somewhat of the conditions considered by Judge Dooling in *Ex parte Chan Shee* (236 Fed. 579), and we quote from pages 583 and 584 as follows:

> "* * * The right to appeal is a valuable right, and no one is in a position to say what

would have been the result if applicant had prosecuted her appeal to a conclusion. It cannot be said that the Bureau encouraged applicant to dismiss her appeal. On the contrary she was advised:

"'That the department would prefer that she prosecute the action before the courts to a final conclusion in the event she is desirous of further contesting the authority of the department to deport her.'"

"If this were all, applicant might not be in a position to complain of the action of the department in refusing to reopen her case after the dismissal of her appeal. But when this refusal is based upon the unwarranted assumption, as is evident from the records of the department itself, that before her appeal was dismissed she was informed that the evidence of her marriage in this state, which she desired to offer as proof of her right to enter, was regarded by the department as proof that she had no such right, and that the department had declared that 'action looking to a reopening of the case will not be taken', I cannot but feel that she has not been accorded that fair hearing upon her application, to which she is entitled under the law."

There are two other cases cited in the telegrams and correspondence in the immigration record to which the court's attention should be invited for reference purposes, the first being *Ex parte Low Joe* (287 Fed. 545), and the other being the case of *Mah Shee v. White* (242 Fed. 868), both of which have to do with the right of the appellant to submit testimony upon his own motion in addition to that brought out by the immigration authorities.

2. MANIFEST ABUSE OF DISCRETION IN CONSIDERING THE EVIDENCE AND FUNDAMENTAL MISCONCEPTION OF THE BASIC RULES OF EVIDENCE.

It is contended as a proposition of law that the Secretary of Labor in determining one of these appeals may manifestly abuse the discretion vested in him by law solely in his consideration of the evidence as in questions of procedure of the hearing itself. I concede that there is quite a latitude of discretion vested in the secretary in the weighing and the determination of the evidence presented before him, and as long as his decision falls within the latitude of that discretion, that his consideration of the evidence is not subject to judicial reviews; but further, and beyond this, I contend that the evidence may be so clear and so positive upon the facts in issue that it can and does establish the admissibility of the appellant beyond all doubt that in such cases the action of the secretary in refusing to be guided by it is a manifest abuse of the power committed to him. For authority for this legal proposition I desire to cite the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. 566), wherein the court recapitulating its earlier holdings in cases of this character, holds as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was

> not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 12; 28 Sup. Ct. 201; 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218."

Now, in the present case it is admitted and conceded by the secretary in all of his decisions and holdings that the evidence presented was and is ample to establish the admissibility of this appellant save as the evidence might be detracted from by reason of his father's prior adverse declaration hereinbefore referred to. The secretary concedes that were it not for this one circumstance that the appellant would be entitled to admission. This brings us to a consideration of the principles of law which fundamentally govern the reception and the exclusion of evidence. It is now, and has been for a number of years past, the policy of the immigration service that in these Chinese admission cases where there existed a prior declaration as to marital status or paternity inconsistent with that developed in the case then under examination, that the immigration officers at the port of entry should regard this prior adverse declaration as an absolute estoppel which would preclude the existence of the relationship claimed and thus pass on for final determination of the question involved in the appeal

to the secretary. Such a method and mode of procedure is a great injustice to an applicant for admission because it deprives him of the right to a full and fair determination of his claim of admission by the only officers to come personally in contact with him, namely, the officers at the port of entry. Such a situation recently engrossed the attention of the Court of Appeals for the Second Circuit, in the case reported as *U. S. v. Pierce* (289 Fed. 233), wherein the court held:

> "In some way not disclosed they supposed themselves, because of the inconsistent stories told by the father and by the stepmother, bound to record a finding contrary to their real decision on the single relevant issue. In that they, of course, were in error. As in any other case, there are no regulative canons for the determination of a question of fact. Inconsistencies may be explained and improbabilities met by the mere weight of the testimony. In this particular case there was, indeed, nothing suspicious in the father's explanation to anyone familiar with the notions of primitive people. The mention of a dead person's name is very generally taboo in primitive culture. But we have nothing to do with the propriety of the board's actual decision; it is enough that the statute gives them the final word.
>
> "The evidence of the board's mistake was good enough; it was incorporated into the record itself; and emanated from the official superior of the members, to whom it had presumably come from them themselves. It makes no difference how it did come; being the declaration of such a person, it was evidence of the fact. These proceedings need not be conducted with the strictness of an action or suit. The courts have again and again sanctioned the ad-

mission of evidence against aliens which was not competent at law, so long as the substance of a fair hearing is preserved. We can scarcely apply such a loose procedure to exclude immigrants and decline to give them its benefit when it works for them. Especially would it be unfair, after submitting Chinese to the not too lenient administration of the immigration and exclusion laws, to deny them what they are entitled to in very right and substance. It is not necessary to say that the inspector's letter of April 28, 1922, was an official record admissible in a court of law; but we hold that in these proceedings it is probative of the facts which it contains."

"Such being the case, the relator was never properly excluded at all; he should have been admitted. The procedure of exclusion is laid down in sections 15, 16, and 17 of the Immigration Act (Comp. St. par. 4289¼hh—4289¼ii). Under sections 15 and 16 it is provided that immigration inspectors shall board all incoming vessels and inspect immigrants; they may detain for examination any whom they suspect of being ineligible. Any alien, who after such an examination shall not appear to the examining inspector beyond doubt to be eligible for entrance, shall be detained for examination by a board of special inquiry. Section 17 prescribes that 'such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported'."

"As we view it, this section makes conclusive a unanimous finding of the board in favor of admission and to disturb it the Secretary of Labor has no power. Now, it is true that the finding was for exclusion; but the record on its face showed that the finding was erroneous, and that the board should have entered precisely the contrary finding. While,

then, the Assistant Secretary had jurisdiction of the appeal, he should have corrected the finding by making it accord with the true decision of the board, the tribunal which alone had any power to pass upon the issue. In substance, however, the case was one over which he had no supervisory jurisdiction, because the board had really decided that the relator had proved his case. In affirming the erroneous finding, it therefore appears to us that the Assistant Secretary disregarded an error which he should have corrected, and assumed a jurisdiction which he did not possess."

While in the case *In re Wong Toy* (278 Fed. 562), at pages 563 and 564 it is held:

"It seems clear that the weight of the evidence on the question of the father's citizenship is in his favor. This was sufficient to entitled the petitioner to a finding in his favor on the point. But the immigration tribunals apparently exacted a higher degree of proof, unwarranted in law, and on that account refused admission. The memorandum of the Assistant Commissioner General says:

"'The very fact that experienced officers have reached different conclusions on the point at issue in the case, and that another party has already been admitted to the United States as being identical with the person represented by the photo on court record No. 9527 (the habeas corpus case), is evidence that there is substantial doubt as to the correctness of the claims now advanced by the present claimant. The burden of proof is by law placed upon the applicant, and it is manifest that it has not been sustained'."

"In other words, the petitioner has been held to establish beyond 'substantial doubt' that his father is a citizen. This was plain and funda-

mental error in law. It was sufficient if the necessary facts were established by a fair preponderance of the evidence."

"Referring to a similar situation, the Supreme Court recently said:

" 'It is better that many Chinese immigrants should be improperly admitted than that one naturalized citizen of the United States should be permanently excluded from the country'. Kwock Jan Fat v. White, 253 U. S. 454; 40 Sup. Ct. 566; 64 L. Ed. 1010.

"On the evidence before the immigration tribunals the right of the applicant to admission was established. An order will be entered that the writ issue, and upon the return of it, unless the respondent desires to present further evidence, an order will be entered that the petitioner be discharged."

In finally submitting this matter we contend that the testimony of five different Chinese witnesses has been taken besides that of the father. The testimony of these five witnesses is all in exact agreement and accord; it is corroborated by the official records of the immigration department to the extent of showing the departures and arrivals of the five who have made trips to and from China; it also corroborates their place of residence in China as testified to by them. The testimony of these five witnesses is amply sufficient, even of itself, to conclusively establish the existence of the relationship of father and son between this appellant and Jang Sing, otherwise known as Jang Wey Ming. Viewing the testimony of the father alone, by itself, as given in the present administrative hearing, it is

in exact accord with all of the testimony supporting the existence of the relationship as claimed in this case; not only is this so, but all of his earlier testimony, excepting in the one instance before his departure for China in 1911, supports the relationship claimed. The most the Government can contend with respect to this earlier conflicting statement of the father is that it affects the father's credibility as a witness but, even so, that cannot affect the credibility of the remaining five witnesses who have testified in this case and the effect of whose testimony is to conclusively establish the existence of the relationship. We claim that there is little or no probative value to the supposed inconsistency in the father's earlier statement as a little reflection and investigation will abundantly confirm as we shall now attempt to show.

The father of this appellant went to China in 1908 under the name of *Jang Ah Fook*. This is established by his departure and return certificate from the immigration files which is an exhibit in this case. This is the essential trip to China upon which he was married and as a result of which trip to China and marriage this appellant was born. Of course, at the time of his marriage in China, in accordance with the Chinese custom, he was given a marriage name which is that of *Jang Wey Ming*. The father's "milk" or baby name, that is, the name given him upon his birth was Jang Fook. Here at this period of his existence we find the father with three names: first, the "milk" or baby name of

Jang Sing, second, the business name of Jang Fook, and third, the marriage name of Jang Wey Ming. The father next went to China upon a laborer's certificate. He filed an application to so depart in 1911. His name is given in that application as Gang Sing. He states that he had no other name and that he had never been to China (Exhibit D, pages 1 and 2). Both of these statements were totally and absolutely untrue, and must have been known to the immigration officials to be untrue, because they had before them the record of his trip to China but three years earlier, which he had made under the name of Jang Ah Fook. We might as well conclude that because the father stated in 1911 that he had no other name, and had never been known by any other name, and that he had never been to China, that these statements should be believed, but such is not the law; there is no probative weight or value to such a statement where there is the official record of the immigration service showing that he was known by another name, namely that of Jang Ah Fook, and that his statement of not having made an earlier trip to China was untrue when they had before them the actual record and documentary evidence of his trip to China three years earlier. The explanation with respect to this matter is not far to seek. These primitive old Chinese people believed that their status under the immigration law was fixed and determined for all time, as it was set forth in their regular certificate of residence, issued under the terms of the

Act of Congress of November 3, 1893 (28 Stat. p. 7), and the father having been so registered as a laborer believed, of course, that his status always had to remain that of a laborer in the eyes of the immigration authorities; that was the reason why he testified when applying for his laborer's return certificate that he was only known under the name of Jang Sing, which was the name given upon his certificate of residence, and he likewise denied ever having been to China because he had made that trip under a different name and under a different status. His object in denying his earlier trip to China was simply for the reason that he was then applying for a laborer's certificate and he was fearful of jeopardizing the issuance of that certificate and hence he denied his other name and denied his other trip to China. The fact of the inaccuracy of the interpretation is to be noted in the remaining portion of his examination. He was asked if he had any property in this country and he stated "No", and then immediately thereafter he goes on to state that he had $1000 due him in this country. This is only cited as an example patent upon the face of his examination at that time and place, as it is evidence to show that there was not a complete understanding between the Chinese interpreter and the father when he was applying for a laborer's return certificate. The father was next asked whether he had a wife or family in this country to see whether the existence of such could be used as a basis for his laborer's certificate, that

being one of the grounds provided by law for the issuance of such certificate. The father correctly answered these two statements that he had no wife or children in this country. Then near the conclusion of the father's examination he was asked whether he had a wife, or ever had a wife, to each of which questions he answered "No"; and in explanation of his testimony when he was finally confronted with these questions he stated he was under the impression the questions were limited to his status in this country, and he also explained that he supposed that all questions relative to his marital status were subject to the same limitation. This is a slight misunderstanding between the interpreter and the father which conclusively shows upon its face that there had not been an exact meeting of the minds. Such a supposed conflict, in view of the explanations offered, could have but little probative weight or value, particularly in view of the fact that there were presented two witnesses who lived in the vicinity of the father in this country and who went to China with him on the same steamer in 1908, and whose homes in China were in the immediate neighborhood of the father, and who were present at the time of his marriage, and who thereafter saw this appellant shortly after his birth and continued to see him a number of times until they left China to return to the United States. Certainly it would be a ridiculous thing to assert as a legal proposition that this supposed conflict in the father's earlier testimony could not

only discredit the father, but that it should also have the effect of impeaching the integrity of all of the remaining five witnesses who have testified in this case. It is respectfully submitted that such a legal conclusion would be unthinkable and not to be sustained under the firmly established principles of American jurisprudence. Certainly it is an absurd conclusion entirely lacking any evidence to support it, and manifestly an abuse of official discretion on the part of the appropriate administrative authorities to conclude that all of the witnesses have wilfully and feloniously perjured themselves in giving their testimony in this case, and that they are all members of a 12-year old conspiracy to land this 14-year old boy in the United States, and it is only upon such a conclusion and finding that there would be any warrant at all upon the part of the appropriate administrative authorities to reject the right of this appellant to enter the United States in the face of the evidentiary showing supported by official documents in the records of the immigration service which have been made in the appellant's behalf. Attention may be drawn to the fact that many of the cases cited refer to the rights where citizenship is involved; in other words, where the Chinese persons whose rights were at stake claimed American citizenship, whereas in the present case no such claim is advanced, the appellant being the 14-year old son of a resident alien Chinese merchant, but in this regard a case of controlling importance decided by this court is

that of a merchant's minor son, the case in question being reported as *Woo Hoo v. White* (243 Fed. 541), wherein the court, speaking through presiding Circuit Judge Gilbert, holds that not all discrepancies or inconsistencies are of probative value, the court holding:

> "Upon such a question, the opinion of a surgeon is believed to be of no greater value than that of a layman and in either case it has but little probative value to show a difference of age of only two years."

In this case the court goes on to criticise acts of unfairness by the trial inspectors which permeated their hearing and reports with unfairness, though they afterwards corrected their misstatements, such corrections did not repair the wrong that had been done fundamentally to the then appellant's case:

> "The error in the report was subsequently corrected; but, notwithstanding the correction the testimony of Woo Mun was disregarded by the inspector as adding nothing to the case."

And further the court goes on to hold:

> "Again, the opinion of the commissioner seems to have been influenced by the fact that the examining inspector believed the applicant to be Woo Sich Ngon, one of two boys who had applied for and were denied admission in 1910, as the sons of Woo Wai Gim. That belief was based upon the resemblance which the inspector found between the applicant and the photograph of Woo Sicj Ngon, taken in April, 1909, when he was 16 years of age, and the general

> resemblance between the applicant and Woo Wai Gim. The photographs of all these persons are in the record before us. We are unable to discover the resemblance which the inspector found. If there is indeed a resemblance, it is extremely remote, and is not sufficient, in our opinion, to constitute evidence. * * * "

This case is finally submitted in the firm belief that this court will not listen in vain to the earnest plea of this humble appellant, but will find from an examination of the entire record that he has not been accorded by the immigration officials at the port of entry and the Secretary of Labor at Washington a full and fair hearing and consideration of his case to which he is by law entitled, and that for this reason the judgment of the lower court should be reversed with directions to issue the writ of habeas corpus as prayed for.

Dated, San Francisco,
October 24, 1923.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorneys for Appellant.

JOHN L. MCNAB,
Attorney for Chinese Six Companies,
Of Counsel.